

**ORIGINAL**

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FILED  
 2012 MAY 14 P 3:14  
 RICHARD W. WICKING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
*NY*

*E-filing**DMR*

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA

*CV 12 2444*

Case No.

DEFENDANT'S NOTICE OF  
 REMOVAL OF ACTION PURSUANT  
 TO 28 U.S.C. §§ 1332(D)(2), 1441,  
 1446, AND 1453

[Supporting Declaration of Donna M.  
 Mezias, Notice of Related Cases,  
 Certification of Interested Entities or  
 Persons and Civil Cover Sheet Filed  
 Concurrently]

(SAN MATEO COUNTY SUPERIOR  
 COURT CASE NO. CIV 513089)

12 KUNAAL SHARMA, individually  
 13 and on behalf of all others similarly  
 14 situated,  
 15 Plaintiff,

v.

16 HOME DEPOT U.S.A., INC. and  
 17 DOES 1 through 50, inclusive,

18 Defendants.

28 DEFENDANT HOME DEPOT U.S.A., INC.'S NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §§  
 1332(D)(2), 1441, 1446, AND 1453

1 TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE  
 2 NORTHERN DISTRICT OF CALIFORNIA:

3 PLEASE TAKE NOTICE that defendant Home Depot U.S.A., Inc. hereby  
 4 removes to this Court the state court action described below, pursuant to 28 U.S.C. §§  
 5 1332(d)(2), 1441, 1446, and 1453. In support thereof, Home Depot states as follows:

6 1. On April 11, 2012, the above referenced putative class action was filed and  
 7 is currently pending against Home Depot in the Superior Court of California, County of  
 8 San Mateo, No. CIV 513089. On April 13, 2012, Home Depot was served with the  
 9 complaint. Home Depot filed an answer to the complaint in the Superior Court on May  
 10 11, 2012. As required by 28 U.S.C. § 1446(a), a true and correct copy of all process,  
 11 pleadings, and orders served upon defendant as part of the above referenced action are  
 12 attached to the Declaration of Donna M. Mezias (“Mezias Decl.”), filed concurrently in  
 13 support of this Notice.

14 2. Plaintiff, a former employee of Home Depot, alleges that Home Depot  
 15 “violated California Labor Code section 1998 and Wage Order 7-2001, section 14 by  
 16 failing to provide suitable seats to plaintiff and other current and former employees.”  
 17 Complaint, ¶ 1. Based on this alleged violation, plaintiff seeks recovery of penalties  
 18 under the California Labor Code Private Attorneys General Act (“PAGA”). *See*  
 19 Complaint, ¶¶ 1, 15-19. The complaint describes a putative class consisting of all  
 20 California-based associates “who worked in the Greeter position at any time from  
 21 February 7, 2011 to the present and were not provided a seat.” *See* Complaint, ¶ 8.

22 3. Timeliness: Plaintiff filed his complaint in the instant action, No. CIV  
 23 513089, on April 11, 2012. Home Depot was served with a copy of the complaint on  
 24 April 13, 2012. Home Depot’s Notice of Removal is therefore timely because it is filed  
 25 within 30 days of service of the complaint. *See* 28 U.S.C. § 1446(b).

26 4. Jurisdiction. The above-described action is a civil action for which this  
 27 Court has original jurisdiction and thus may be removed pursuant to 28 U.S.C. § 1441.

1 Under 28 U.S.C. § 1441(a), a defendant may remove to federal district court “any civil  
 2 action brought in a State court of which the district courts of the United States have  
 3 original jurisdiction....” Pursuant to the Class Action Fairness Act (“CAFA”), Pub. L.  
 4 No. 109-2 (enacted Feb. 18, 2005) (codified at 28 U.S.C. §§ 1332(d), 1453, 1711-1715),  
 5 federal district courts have original jurisdiction over a class action if (1) it involves 100  
 6 or more putative class members, (2) any class member is a citizen of a state different  
 7 from any defendant, and (3) the aggregated controversy exceeds \$5,000,000 (exclusive  
 8 of costs and interest). *See* 28 U.S.C. §§ 1332(d)(2), (d)(6) and d(11)(B)(i).

9       5.     Class Size. In the complaint, plaintiff alleges that “the Class consists of  
 10 well over 1,000 individuals.” *See* Complaint, ¶ 10. Home Depot accepts as true, for  
 11 purposes of removal only, plaintiff’s allegation regarding the size of the class. Based on  
 12 plaintiff’s allegation, CAFA’s 100-person requirement is “presumptively satisfied.” *See*  
 13 *Lowdermilk v. U.S. Bank Nat’l Ass’n*, 479 F.3d 994, 998 (9th Cir. 2007).<sup>1</sup>

14       6.     Diversity of Citizenship. At all relevant times, there has been diversity of  
 15 citizenship between the parties to the action.

16       7.     Plaintiff alleges that he is a resident, and thus a citizen, of the State of  
 17 California. *See* Complaint, ¶ 2.

18       8.     Home Depot is not a citizen of the State of California. “[A] corporation  
 19 shall be deemed to be a citizen of any State by which it has been incorporated and of the  
 20 State where it has its principal place of business . . . .” 28 U.S.C. § 1332(c)(1). Home  
 21 Depot is not incorporated in California. Rather, Home Depot is a corporation organized

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22  
 23       1 The presumption applied by the Ninth Circuit related to the amount in controversy  
 24 requirement; however, district courts have applied *Lowdermilk* to CAFA’s 100-person  
 25 requirement. *See Coit v. Fidelity Assurance Assocs., LLC*, No. C 08-02585 JSW, 2008  
 26 WL 3286978, at \*4 (N.D. Cal. Aug. 6, 2008) (where complaint failed to specify size of  
 27 class, court applied the preponderance of the evidence standard to determine whether  
 CAFA’s 100-person requirement had been met); *see also Saulic v. Symantec Corp.*, No.  
 SA CV 07-610 AHS (PLAx), 2007 WL 5074883, at \*8 (C.D. Cal. Dec. 26, 2007) (court  
 must determine whether the evidence established that it was “more likely than not” that  
 the putative class was a particular size).

1 and incorporated under the laws of the State of Delaware. *See* Complaint, ¶ 3. Nor is  
 2 California the state in which Home Depot has its principal place of business, which  
 3 refers to “the place where a corporation’s officers direct, control, and coordinate the  
 4 corporation’s activities.” *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1192 (2010). Rather,  
 5 Home Depot’s principal place of business is Atlanta, Georgia. *See Ottaviano v. Home*  
 6 *Depot U.S.A., Inc.*, Civ. No. 1:09-cv-05125, 2010 U.S. Dist. LEXIS 27279, at \*3 (N.D.  
 7 Ill. Mar. 23, 2010) (Home Depot “is a Delaware corporation with its principal executive  
 8 offices located in Atlanta, Georgia”); *Novak v. Home Depot U.S.A., Inc.*, 259 F.R.D.  
 9 106, 108 (D. N.J. 2009) (same). Accordingly, this action is between citizens of different  
 10 states.

11       9.     Amount in Controversy. This action meets the jurisdictional requirement  
 12 of CAFA, because more than \$5,000,000 is in controversy. Plaintiff does not allege a  
 13 specific amount in controversy in the complaint. Where, as here, the plaintiff fails to  
 14 specify an amount of damages, defendant seeking removal must demonstrate that the  
 15 amount in controversy requirement has been met. *See Lowdermilk*, 479 F.3d at 998.  
 16 Home Depot denies that plaintiff’s claims have any merit or value, but it avers that the  
 17 relief plaintiff seeks on behalf of the class exceeds \$5,000,000.

18       10. Plaintiff seeks recovery of penalties under the “fallback” provision of  
 19 PAGA, Labor Code section 2699(f), which provides that for Labor Code sections for  
 20 which a civil penalty is not specifically provided, PAGA provides a civil penalty of \$100  
 21 for each aggrieved employee per pay period for the initial violation and \$200 for each  
 22 aggrieved employee per pay period for each subsequent violation. *See* Complaint ¶¶ 1,  
 23 15-19; Cal. Lab. Code § 2699(f)(2).

24       11. The term “violation” as used in section 2699(f) is ambiguous, and the  
 25 courts have not fully resolved its proper construction. Home Depot avers, for purpose  
 26 of removal only, that plaintiff may argue that each pay period without a seat constitutes  
 27 a “violation” under section 2699(f). Under that construction, plaintiff may seek

1 penalties of \$100 for the initial violation (i.e., the first pay period for each class member  
2 within the statute of limitations period) and \$200 for each class member for subsequent  
3 violations (i.e., subsequent pay periods). While Home Depot is not aware of any court  
4 that has adopted this construction of 2699(f), it has been accepted for purposes of  
5 establishing the amount in controversy at removal. *See Schiller v. David's Bridal, Inc.*,  
6 No. 1:10-cv-00616 AWI SKO, 2010 WL 2793650, at \*7 (E.D. Cal. July 14, 2010)  
7 (denying remand since defendant's calculation of PAGA damages, which relied on \$200  
8 for subsequent pay periods, exceeded \$5 million); *Butterworth v. American Eagle  
9 Outfitters, Inc.*, No. 1:11cv01203 LJO DLB, 2011 WL 4905641, at \*4-5 (E.D. Cal. Oct.  
10 14, 2011) (same).

11       12. Plaintiff alleges that the class "consists of well over 1,000 individuals."  
12 *See* Complaint, ¶ 10. Assuming, for purposes of removal only, that the putative class  
13 consists of 1,000 individuals, the penalties sought by the class under PAGA exceed \$5  
14 million.

15       13. Plaintiff seeks to represent a class of employees "from February 7, 2011 to  
16 the present." Complaint, ¶ 8. Assuming that each of the 1,000 alleged class members  
17 worked each pay period from February 7, 2011 through April 13, 2012, the date the  
18 complaint was served, plaintiff may seek penalties of \$100 for the initial pay period and  
19 \$200 for each of the 30 subsequent bi-weekly pay periods through the date the  
20 complaint was filed, or \$6,100, for each class member, and total penalties of  
21 \$6,100,000. Thus, CAFA's \$5 million amount in controversy requirement has been met.

22       14. Venue. The United States District Court for the Northern District of  
23 California is the judicial district embracing the place where the above referenced action  
24 was filed by plaintiff and is therefore the appropriate court for removal pursuant to 28  
25 U.S.C. § 1441(a).

15. There are no grounds that would justify this Court in declining to exercise its jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(3) or requiring it to decline to exercise jurisdiction pursuant to 28 U.S.C. §§ 1332(d)(4).

WHEREFORE, defendant requests that the above action now pending against it in the Superior Court of California, County of San Mateo, be removed therefrom to this Court. In the event the Court has any reason to question whether removal in this action was proper, Home Depot requests the opportunity to provide briefing on the issue.

Respectfully submitted,

Dated: May 14, 2012

# AKIN GUMP STRAUSS HAUER & FELD LLP

By Donna M. Mezias  
Donna M. Mezias  
Attorneys for Defendant  
HOME DEPOT U.S.A., INC.

1 PROOF OF SERVICE

2 STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

3 I am employed in the County of San Francisco, State of California. I am over the  
4 age of 18 and not a party to the within action; my business address is: 580 California  
5 Street, Suite 1500, San Francisco, CA 94104. On May 14, 2012, I served the  
6 document(s) described as:

- 7 1. DEFENDANT'S NOTICE OF REMOVAL OF ACTION PURSUANT TO  
8 28 U.S.C. §§ 1332(D)(2), 1441, 1446, AND 1453;
- 9 2. DEFENDANT HOME DEPOT U.S.A., INC.'S CERTIFICATION OF  
10 INTERESTED ENTITIES OR PERSONS;
- 11 3. DECLARATION OF DONNA M. MEZIAS IN SUPPORT OF  
12 DEFENDANT HOME DEPOT, U.S.A., INC.'S NOTICE OF REMOVAL  
13 OF ACTION;
- 14 4. DEFENDANT HOME DEPOT U.S.A., INC.'S NOTICE OF RELATED  
15 CASES; and
- 16 5. CIVIL COVER SHEET

17 on the interested party(ies) below, using the following means:

18 *Attorneys for Plaintiff*

19 Matthew Righetti  
John J. Glugoski  
Righetti Glugoski, P.C.  
20 456 Montgomery St., Suite 1400  
San Francisco, CA 94104

18 *Attorneys for Plaintiff*

19 James F. Clapp  
Marita Murphy Lauinger  
Zachariah P. Dostart  
20 Dostart Clapp Gordon & Coveney, LLP  
4370 La Jolla Village Drive, Suite 970  
San Diego, California 92122-1253

18 *Attorneys for Plaintiff*

19 Kevin J. McInerney  
McInerney & Jones  
20 18124 Wedge Parkway #503  
Reno, Nevada 89511

21  BY UNITED STATES MAIL I enclosed the documents in a sealed envelope or  
22 package addressed to the respective address(es) of the party(ies) stated above and placed  
the envelope(s) for collection and mailing, following our ordinary business practices. I  
23 am readily familiar with the firm's practice of collection and processing correspondence  
for mailing. On the same day that correspondence is placed for collection and mailing,  
it is deposited in the ordinary course of business with the United States Postal Service,  
24 in a sealed envelope with postage fully prepaid at San Francisco, California.

25  BY MESSENGER SERVICE I served the documents by placing them in an  
envelope or package addressed to the respective address(es) of the party(ies) stated  
above and providing them to a professional messenger service for service.

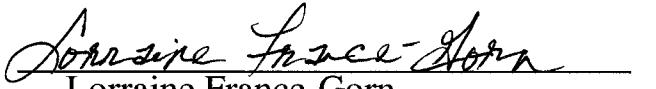
26  BY OVERNIGHT DELIVERY I enclosed the document(s) in an envelope or  
package provided by an overnight delivery carrier and addressed to the respective  
address(es) of the party(ies) stated above. I placed the envelope or package for

1 collection and overnight delivery at an office or a regularly utilized drop box of the  
2 overnight delivery carrier.

3  BY ELECTRONIC MAIL OR ELECTRONIC TRANSMISSION. Based on a court  
4 order or an agreement of the parties to accept service by e-mail or electronic  
5 transmission, I caused the document(s) to be sent to the respective e-mail address(es) of  
the party(ies) as stated above. I did not receive, within a reasonable time after the  
transmission, any electronic message or other indication that the transmission was  
unsuccessful.

6 I declare that I am employed in the office of a member of the bar of this court at  
whose direction the service was made.

7 I declare under penalty of perjury under the laws of the State of California that the  
8 foregoing is true and correct. Executed on May 14, 2012 at San Francisco, California.

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10   
11 Lorraine France-Gorn  
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